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MCLE SELF-STUDY

When to Run, Walk or Crawl to the Courthouse: An Overview of the California Supreme Court's Recent Jurisprudence Concerning the Proper Timing of Legal Challenges to Initiative Measures

*By Richard C. Miadich & William B. Tunick**

INTRODUCTION

The California Constitution reserves to California voters the "initiative power" – the power to directly propose legislation and enact the same into law by a majority-vote of the electorate.[1] Added to the California Constitution in 1911 as part of a package of Progressive reform measures championed by Governor Hiram Johnson, the initiative power is based on the theory that all power of government ultimately resides in the people.[2] Today, Californians are using the initiative process with greater frequency than ever before. Of the twenty-four states with an established initiative process, Californians' use of the initiative is second only to Oregonians'.[3] Between 1990 and 2000, over 450 state initiative measures circulated for signatures, with forty percent garnering the necessary votes on election day.[4]

A similar trend has emerged at the local level.[5] The use of the local initiative, brought about as early as 1898 by another Progressive era reform – municipal "home rule" – reached new heights in the 1990's with over 730 local initiatives circulated for signature in California.[6] On average, voters in large, growing and economically diverse cities were more likely to use the initiative power than were voters in smaller, less diverse cities. At both the local and state levels, the initiative process is increasingly directed at some of the most contentious substantive policy areas of the day. Recent state measures included proposals on abortion, stem-cell research, access to health care, criminal penalties, redistricting, and the rights of same-sex couples.[7] The most common topics addressed by local initiatives are land use, local governance and safety.[8]

As stakeholders in these hotly debated state and local issues increasingly rely on initiatives as their vehicle of choice to advance policy, the necessity of litigation as an adjunct to the political campaign for or against such measures increases. One needs look no further than the November 2005 Special Election for evidence of this fact: stakeholders instituted legal proceedings, in one form or another, against half of the measures that appeared on that ballot. Now, more than ever, lawyers representing stakeholders in ballot measure contests must be prepared to advise their clients with respect to ballot measure litigation. In so doing, a threshold issue must be confronted: when is the proper time to bring such a challenge – before or after the election?

The purpose of this article is to assist counsel in answering this question. In Part I, we review the status of the law concerning the proper timing of challenges to initiative measures prior to the November 2005 Special Election. In Part II, we review two California Supreme Court cases decided in the wake of that election – *Costa v. Superior Ct.* and *Independent Energy Producers v. McPherson* – in which the Court sought to further clarify the proper time for bringing challenges to initiative measures. Finally, in Part III, we analyze the framework stated in these decisions for determining when judicial review of a measure should be sought before an election ("pre-election review") and when it should be sought after an election ("post-election review").

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I. SENATE V. JONES AND THE LAW OF PRE-ELECTION REVIEW PRIOR TO THE NOVEMBER 2005 SPECIAL ELECTION

Prior to the November 2005 Special Election, the California Supreme Court's decision in *Senate v. Jones*[9] ("*Jones*") was the leading case regarding the appropriate timing for judicial review of initiative measures in California. *Jones* concerned a pre-election challenge to an initiative measure designated as Proposition 24 on the March 7, 2000 election ballot, which proposed transferring the power of reapportionment from the Legislature to the Supreme Court and made changes (including reductions) to the compensation of legislators and other statewide officers. The petitioners in *Jones* challenged the constitutionality of Proposition 24 on two main grounds: (1) that it embraced more than one subject in violation of the "single-subject rule" and (2) that it constituted a constitutional revision in excess of the people's initiative power.

Before concluding that Proposition 24 was unconstitutional on single-subject grounds, the Court in *Jones* first addressed the propriety of pre-election review.[10] It observed that, in the absence of a clear showing of invalidity, "it is usually more appropriate to review constitutional and other challenges to ballot propositions after an election rather than to disrupt the electoral process."[11] However, the Court noted that this strong presumption against pre-election review applied only to challenges based on the alleged unconstitutionality of the *substance* of a proposed measure.[12] Thus, the Court explained that under its prior decisions, pre-election review was *not* necessarily precluded where a challenge was based on a claim that the measure could not properly be submitted to the voters in the first instance because it was not legislative in character or because it amounted to a constitutional revision in excess of the initiative power.[13]

Prior to *Jones*, however, a question existed as to the proper timing of review of single-subject challenges. On the one hand, the presumption against pre-election review – seemingly grounded in considerations of judicial self-restraint – suggested that review should wait until actual passage of the challenged measure clearly compelled it.[14] On the other hand, placement of clearly invalid measures on the ballot could tend to degrade the electorate's confidence in the electoral process.[15]

In the end, the Court's answer in *Jones* – that pre-election review of a single-subject challenge *may* be appropriate – rested neither on judicial restraint nor the affect on the electoral process. Instead, the Court focused on the precise language of the constitutional single-subject rule. Article II, section 8, subdivision (d) of the state constitution explicitly provides that "[a]n initiative measure embracing more than one subject *may not be submitted to the electors* or have any effect." {Emphasis added.} Based on this language, the Court explained that pre-election review of single-subject challenges was not only permissible, but "expressly contemplated" by the state constitution.[16]

However, the Court in *Jones* suggested that the propriety of pre-election review of a single-subject challenge would depend on the strength of that claim. The Court noted that while declining to adjudicate a single-subject challenge to a state initiative measure in *Brosnahan v. Eu*, it recognized that pre-election review might be appropriate upon "a clear showing of invalidity."[17] Combining this precedent with the explicit language of the single-subject provision, the Court in *Jones* therefore held that where challengers are able to demonstrate that there is a strong likelihood that the initiative violates the single-subject rule, pre-election review of the measure is appropriate.[18]

II. THE 2005 SPECIAL ELECTION CASES: COSTA V. SUPERIOR CT. AND INDEPENDENT ENERGY PRODUCERS V. MCPHERSON

Following the November 2005 Special Election, the California Supreme Court issued two decisions in which it sought to clarify the proper timing of challenges to ballot measures – *Costa v. Superior Ct.*[19] ("*Costa*") and *Independent Energy Producers v. McPherson*[20] ("*IEP*").

A. *Costa v. Superior Ct.*

In *Costa* the Court reviewed a pre-election challenge to Proposition 77, an initiative measure that (like Proposition 24 in *Jones*) proposed stripping the Legislature of reapportionment power. The Attorney General brought a pre-election challenge after learning that the text that the measure's proponents submitted to the Attorney General for a title and summary differed from the text contained on the initiative petitions circulated among the voters for signatures. Specifically, the Attorney General sought a writ of mandate directing the Secretary of State to withhold Proposition 77 from the ballot. Both the trial court and the Court of Appeal for the Third Appellate District concluded that the discrepancies between the text of the measure submitted to the Attorney General and the text on the signature petitions warranted withholding the measure from the ballot.

Proposition 77's proponents then filed an emergency petition in the Supreme Court, in response to which the Court issued an emergency order staying the appellate court's decision. The Court's order stated that, in the absence of a showing that the discrepancies between the two versions of the measure had misled persons signing the initiative petition, it was not appropriate to deny the voters the opportunity to vote for it. The Court stated that it would decide after the election whether to retain jurisdiction to resolve the issues raised in the petition.

Although the voters rejected Proposition 77 in the November 2005 Special Election, the Court retained jurisdiction, in part, to provide guidance concerning the proper time to review so-called "procedural" challenges to initiative measures. The Court began by reiterating the general rule that it is usually more appropriate to review constitutional challenges to ballot measures after an election, unless the claims concern the scope of the people's initiative power or the single-subject rule.[21] By contrast, the Attorney General based his request to withhold Proposition 77 from the ballot on the claimed defect in the petition-circulation process. The Court characterized this type of claim as a "procedural challenge" – one based on an asserted failure "to comply with the essential procedural requirements necessary to qualify an initiative measure for the ballot."[22] As to such claims, the Court held that pre-election review is appropriate because "if the threshold procedural prerequisites have not been satisfied, the measure is not entitled to be submitted to the voters."[23]

The Court buttressed its holding in *Costa* with concerns over mootness. The Court pointed out that once an election takes place, the matter is "*a fait accompli*" – a completed act.[24] California courts have long been loathe to overturn the results of an election based an asserted procedural defect in the petition-circulation process, at least to the extent that such defects are not alleged to have effected the material before the voters or the fairness or accuracy of the election result.[25] In light of this "well-established remedial limitation" the *Costa* Court concluded that it would be unfair to postpone the determination of procedural challenges to a ballot measure until after the election because such a claim will likely be moot by that time.[26]

B. *Independent Energy Producers Association v. McPherson*

Four months after *Costa*, the Court again offered guidance concerning the propriety of pre-election review of challenges to ballot measures in *IEP*. *IEP* involved a pre-election challenge to Proposition 80, an initiative measure relating to energy regulation that, among other things, contained provisions conferring additional jurisdiction on the California Public Utilities Commission ("PUC"). Unlike the procedural challenge advanced in *Costa*, the petitioners in *IEP* attacked Proposition 80 on the grounds that it could not lawfully be placed on the ballot because the California Constitution permits only the Legislature, and not the people through the initiative process, to confer additional jurisdiction on the PUC.[27] After the Court of Appeal ordered Proposition 80 removed from the ballot, the Supreme Court issued an emergency order, as it did in *Costa*, restoring the measure to the ballot and indicating that it would decide after the election whether to retain jurisdiction in the matter, which it did.

On review, the Court held that the general rule eschewing pre-election review of initiative measures that it affirmed in *Jones* did not apply to the type of challenge advanced by the *IEP* petitioners. Similar to claims that a measure constitutes a revision, claims that the people lack the authority to legislate in a particular area go to the question of whether the measure is one that may be enacted by initiative in the first instance.[28] Thus, the Court in *IEP* held that pre-election review of such claims is not necessarily or presumptively improper.[29]

Having opened the door to pre-election review of such claims, the Court in *IEP* then appeared to immediately qualify its holding by admonishing courts about the propriety of doing just that. Specifically, the Court in *IEP* instructed courts facing this type of pre-election challenge to be mindful of the fact that, unlike procedural challenges, challenges based on a claim that the measure cannot be lawfully enacted through the initiative process will not become moot if the measure is approved by the voters.[30] This includes challenges based on the single-subject rule, that the measure is not legislative in character, or that the proposed measure constitutes a constitutional revision beyond the scope of the initiative power. While it is appropriate for courts facing these types of challenges at the pre-election stage to also consider the potential costs that delayed resolution may have on the voters' confidence in the initiative process, the *IEP* Court concluded by stating that:

> Nonetheless, because this type of challenge is one that can be raised and resolved after an election, deferring judicial resolution until after the election – when there will be more time for full briefing and deliberation – will often be the wiser course.[31]

We now turn to an examination of the framework that emerged from these decisions.

III. THE PROPER TIMING OF CHALLENGES TO INITIATIVE MEASURES AFTER COSTA AND IEP

After *Costa* and *IEP*, it appears that the California Supreme Court divides initiative measure challenges into three categories for purposes of determining when review is proper – procedural, substantive and subject-matter limited. Whether pre-election review of a claim is available will therefore depend upon into which category that challenge falls.

A. Procedural Challenges

After *Costa*, it now appears clear that "procedural challenges" – those based on a measure's alleged failure to satisfy the necessary prerequisites for placement on the ballot – are subject to pre-election review. The Court's holding in *Costa* embraced the view that such claims go to the measure's entitlement to appear on the ballot and would likely evade judicial review on the basis of mootness or considerations of judicial self-restraint if not heard prior to the election. In addition to challenges based on alleged defects in the circulation process, the Court in *Costa* characterized as "procedural challenges" those claims alleging:

- failure to meet format, timing or signature requirements applicable to local and state initiative petitions;[32]
- insufficiency of Attorney General's title and/or summary;[33]
- failure to include a short title across the top of every page of signature petition;[34] and,
- failure to submit an accurate copy of the text for title and summary.[35]

B. Substantive Challenges

Consistent with *Jones* and prior cases, the Court in *Costa* and *IEP* again reaffirmed the rule that review of substantive challenges to the provisions of proposed initiative measures is not appropriate until after an election. This rule appears to be grounded in considerations of judicial self-restraint which counsel against deciding questions that could become moot if the voters fail to approve the challenged measure. Once a measure is adopted, however, substantive challenges to the provisions of a ballot measure will usually become ripe for review.[36]

C. Subject-Matter Limited and/or Scope of Initiative Power Challenges

While the framework the Court set out in *Costa* and *IEP* provides a fair degree of certainty as to when procedural or substantive challenges should be brought, it provides almost no certainty with regard to the proper timing for challenges based on subject-matter or scope of the initiative power. Among these types of challenges are those which claim that the measure:

- violates the state single-subject rule; [37]
- constitutes a constitutional revision in excess of initiative power;[38]
- is being used to apply for the convening of a federal constitutional convention;[39]
- violates the one-reapportionment-per-decade rule;[40]
- seeks to legislate, through local law, a matter of federal policy;[41] or,
- seeks to exercise, through the initiative process, power that the state constitution confers exclusively in the Legislature (e.g., reapportionment; additional jurisdiction to PUC).[42]

After *IEP*, the availability of pre-election review for such claims appears to depend on the challengers' ability to persuade a court that they are likely to prevail. At first blush, this standard seems to be entirely result-orientated. But upon further reflection, it also may reveal the Court's assessment of how to best balance the interests of those seeking redress for (legitimate) claims concerning a proposed initiative measure against the broader interest in avoiding unnecessary interference with the initiative process.

Under the standard set out in *IEP*, where a strong showing is made that the electorate lacks the power to enact a measure through the initiative process in the first instance, the balance tips in favor of pre-election review. If one accepts the Court's view that placement of otherwise invalid measures on the ballot is likely to reduce public confidence in the initiative process, this is a logical outcome. By contrast, where it is not

clear that the challenged measure is invalid, the need to interfere with the initiative process before an election is less compelling – especially since the types of claims in this category will generally not become moot after the election. Put differently, the standard in *IEP* seems to indicate that courts should only risk interfering with the initiative process where the failure to do so could cause more harm than good.

Significantly, the concerns expressed by the Court in *IEP* concerning unnecessary interference with elections also appear to track recent statements by the United States Supreme Court. Four months after *IEP*, the United States Supreme Court in *Purcell v. Gonzalez*[43] vacated an order issued by a motions panel of the Ninth Circuit enjoining Arizona's voter identification procedures. The panel issued its order enjoining the Arizona laws after the district court denied plaintiffs' request for a preliminary injunction and only weeks prior to the election, but before the district court issued its findings of fact. As a result, the panel's order omitted any statements of fact or any indication, in the Supreme Court's view, of the reasoning underlying it. In vacating the order, the Court explained that in weighing the relative interests involved in requests for orders affecting elections, courts should weigh "considerations specific to elections cases," including how conflicting orders affecting elections ". . . can themselves result in voters' confusion and consequent incentive to remain away from the polls. As an election draws closer, that risk will increase."[44]

Although the application of this statement beyond the facts presented in *Purcell* is unclear, it does appear consistent with the standard set out by the California Supreme Court in *IEP*. The standard announced in *IEP* should, presumably, decrease the risk of conflicting orders concerning subject-matter and/or scope of power challenges to initiative measures because only those challenges with a high probability of success are eligible for pre-election review.

CONCLUSION

Given the increased use of the initiative process at the state and local level, the California Supreme Court wisely took the opportunity in *Costa* and *IEP* to articulate a framework setting out the proper timing for legal challenges to such measures. While that framework provides a fair degree of certainty concerning the proper timing of procedural and substantive challenges, it provides far less clarity as to the proper time to review subject-matter and/or scope of power challenges. Ultimately, only time and experience will reveal whether that standard is a success or failure.

ENDNOTES

1. Cal. Const. art. II, § 8; §§ 9, 13 & 14 also reserve to the voters the powers of recall and referendum.
2. *Associated Home Builders v. Livermore* (1976) 18 Cal.3d 582, 591.
3. Tracy M. Gordon, *The Local Initiative in California* (Public Policy Institute of California, 2004), p. 2.
4. *Id.* at pp. vi & 19.
5. Gordon, *supra* at p. 4.
6. *Id.* at pp. vi & 19.
7. See, e.g., Proposition 73 (2005) & Proposition 85 (2006) [abortion]; Proposition 71 (2004) [stem cell research]; Proposition 78, Proposition 79 (2005) & Proposition 72 (2004) [health care]; Proposition 66 (2004) & Proposition 36 (2000) [criminal sentencing]; Proposition 77 (2005) [redistricting]; Proposition 22 (2000) [same-sex couples].
8. Gordon, *supra*, at p. vi.
9. (1999) 21 Cal.4th 1142.
10. *Jones, supra*, 21 Cal.4th at 1153.
11. *Id.* at p. 1153, quoting *Brosnahan v. Eu* (1982) 31 Cal.3d 1, 4, quotations omitted.
12. *Jones, supra,* 21 Cal.4th at 1153.
13. *Ibid.*, citing *Brosnahan, supra,* 31 Cal.3d at 4.
14. *Legislature v. Deukmejian* (1983) 34 Cal.3d 658, 666.
15. *American Federal of Labor v. Eu* (1984) 36 Cal.3d 687, 697.
16. The dissent disagreed. "[A] single-subject challenge does not present [a] generic or jurisdictional issue. Rather, a single-subject challenge requires a careful examination of the measure's particular provisions, or in other words, a review of its substance." *Id.* at p. 1171 (dis. opn. of Kennard, J.), citing *Schmitz v. Younger* (1978) 21 Cal.3d 517.
17. *Jones, supra,* 21 Cal.4th at 1154, citing *Brosnahan, supra,* 31 Cal.3d at 4.
18. *Jones, supra,* 21 Cal.4th at 1154, citing *California Trial Lawyers Assn. v. Eu* (1988) 200 Cal.App.3d 351, 357.
19. (2006) 37 Cal.4th 986.
20. (2006) 38 Cal.4th 1020.
21. *Costa, supra,* 37 Cal.4th at 1005.
22. *Id.* at p. 1006.
23. *Ibid.*
24. *Costa, supra,* 37 Cal.4th at 1007.
25. *Id.* at pp. 1006-1007.
26. *Id.* at p. 1007.
27. *IEP, supra,* 38 Cal.4th at 1023.
28. *IEP, supra,* 38 Cal.4th at 1029-1030.
29. *Ibid.*
30. *IEP, supra,* 38 Cal.4th at 1030.
31. *Ibid.*
32. *Costa, supra,* 37 Cal.4th 986.
33. *Boyd v. Jordan* (1934) 1 Cal.2d 468; *Epperson v. Jordan* (1938) 12 Cal.2d 61; *Clark v. Jordan* (1936) 7 Cal.2d 248; *Zaremberg v. Superior Ct.* (2004) 115 Cal.App.4th 111.
34. *Zaremberg, supra,* 115 Cal.App.4th 111.
35. *Jones, supra,* 21 Cal.4th 1142.
36. See, e.g., *Calfarm Insurance Company v. Deukmejian* (1989) 48 Cal.3d 805 (challenge to amendments enacted by Proposition 103 [insurance regulation]); *People's Advocate v. Independent Citizens' Oversight Committee* (2006) 2006 WL 1417983 (challenge to amendments enacted by Proposition 71 [stem-cell research funding]); *National Audubon Society, Inc. v. Davis* (2002) 307 F.3d 835 (challenge to amendments enacted by Proposition 4 [protection of species].)
37. *Jones, supra,* 21 Cal.4th at 1153-1154.
38. *McFadden v. Jordan* (1948) 32 Cal.2d 330.
39. *American Federal of Labor, supra,* 36 Cal.3d 687.
40. *Legislature v. Deukmejian, supra,* 34 Cal.3d 658.
41. *Farley v. Healey* (1967) 67 Cal.2d 325
42. *IEP, supra,* 38 Cal.4th 1020; *Legislature v. Deukmejian, supra,* 34 Cal.3d 658.
43. 2006 WL 2988365 (U.S.).
44. *Purcell, supra,* 2006 WL 2988365 at *7.

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Earn one hour of MCLE credit by reading the article titled "When to Run, Walk or Crawl to the Courthouse: An Overview of the California Supreme Court's Recent Jurisprudence Concerning the Proper Timing of Legal Challenges to Initiative Measures" on pages 1-5 and answering the below questions, choosing the one best answer to each question

1. There are three categories of challenge for initiative measures: (1) procedural; (2) substantive; and (3) subject-matter limited and/or scope of initiative power.
   ❏ True ❏ False
2. A claim that an initiative measure seeks to legislate, through local law, a matter of federal policy, is an example of a procedural challenge.
   ❏ True ❏ False
3. Voters in large, growing and economically diverse cities are more likely to propose a local initiative than voters in small, less diverse, cities.
   ❏ True ❏ False
4. A failure by the initiative proponents to include a short title across the top of every page of the signature petition is grounds for a procedural challenge.
   ❏ True ❏ False
5. Substantive challenges to the provisions of proposed initiative measures should not be brought until after an election.
   ❏ True ❏ False
6. An initiative that constitutes a constitutional revision in excess of initiative power is subject to a procedural challenge.
   ❏ True ❏ False
7. Procedural challenges to a ballot measure are subject to pre-election review.
   ❏ True ❏ False
8. Recent California Supreme Court cases do not provide certainty as to the proper timing for challenges based on subject-matter limited and/or scope of initiative power.
   ❏ True ❏ False
9. California voters use their power of initiative more than voters in any other state in the nation.
   ❏ True ❏ False
10. Land use is one of the most common topics addressed by local initiatives.
    ❏ True ❏ False
11. Twenty-seven (27) states currently have an established initiative process.
    ❏ True ❏ False
12. After the November 2005 Special Election, stakeholders initiated legal proceedings against half of the initiative measures that had appeared on the ballot.
    ❏ True ❏ False
13. A challenge against the insufficiency of the Attorney General's title and/or summary should be brought after the election.
    ❏ True ❏ False
14. A claim alleging a failure to submit an accurate copy of the text for the title and summary of the initiative should be brought prior to the election.
    ❏ True ❏ False
15. Whether an initiative violates the one-reapportionment-per-decade rule is a challenge based on the subject-matter limited and/or scope of the initiative power.
    ❏ True ❏ False
16. If an initiative seeks to give the voters power that the State Constitution confers exclusively to the Legislature, a substantive challenge would be appropriate.
    ❏ True ❏ False
17. A claim based on a defect in the circulation process would be a substantive challenge to the initiative measure.
    ❏ True ❏ False
18. The use of initiatives at the local level decreased in the 1990s.
    ❏ True ❏ False
19. It is unclear whether a challenge to an initiative violating the State's single-subject rule should be brought before or after an election.
    ❏ True ❏ False
20. Californians received the initiative power in 1911.
    ❏ True ❏ False

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In the furtherance of its mission and goals, the Public Law Section invites papers for possible publication in the *Public Law Journal*. Such papers should consider an aspect of public law written in the 2006-2007 or current academic year by a student currently enrolled in an accredited California law school's J.D. program. The paper may be specifically prepared for this contest or based on a paper submitted in a class, seminar, or as an independent study program. The paper should, however, be the work of the submitting student without substantial editorial input from others. A student need not be a member of the Public Law Section to participate in this writing contest.

Papers should be limited to between 2,500 and 3,000 words of double-spaced typed text and include citations in either Bluebook or California Style Manual format.

The mission of the Public Law Section is to ensure that laws relating to the function and operation of public agencies are clear, effective and serve the public interest; to advance public service through public law practice; and to enhance the effectiveness of public law practitioners. Comprised of over 1,300 members, including law students, the Section focuses on addressing issues related to administrative law, constitutional law, municipal law, open meeting laws, political and/or election law, education law, state and federal legislation, public employment, government contracts, tort liability and regulations, land use/environment issues, and public lawyer ethics.

The Section provides topical educational programs, seminars and resource materials; works to enhance the recognition of, and participation by, public law practitioners in the State Bar; presents its annual "Public Lawyer of the Year" award to public law practitioners who have made significant and continuous contributions to the profession; and publishes the quarterly *Public Law Journal*.

Award

The author of the winning student paper will receive a $500 cash prize from the Public Law Section and have his or her paper published in the Fall 2007 edition of the *Public Law Journal*. The winning author will also be recognized at the Public Law Section's annual Public Lawyer of the Year award ceremony which takes place during the State Bar Meeting in Anaheim in September 2007.

Deadline/Method of Submission

Papers must be received by midnight (PST) on August 17, 2007 to be eligible for consideration in this writing contest. Please submit papers by email in either Word or WordPerfect format to Leslie.Dufresne@bbklaw.com.

Judging

A preliminary review of the submitted papers will be done by selected members of the Section's Executive Committee. The final three papers will then be distributed to the entire Executive Committee for consideration and a final vote.

Papers will be judged based on the following criteria, though not necessarily in this order:

- complexity of topic
- relevancy to one or more areas of public law
- timeliness of topic to current developments in public law
- originality
- quality of writing

It is expected that a member of the Section's Executive Committee will notify the winner by September 15, 2007.

Please direct any questions regarding this contest to Leslie.Dufresne@bbklaw.com.

Litigation & Case Law Update

*Compiled by Richard C. Miadich**

The purpose of the Litigation Update is to alert the *Journal's* readers to recent judicial decisions touching areas of public law.

Administrative Law

Department of Alcoholic Beverage Control v. Alcoholic Beverage Control Appeals Board (2006) 40 Cal.4th 1

In this consolidated appeal, the California Supreme Court reviewed decisions by the Alcoholic Beverage Control Appeals Board ("Appeals Board") reversing decisions of the Department of Alcoholic Beverage Control ("ABC") to suspend three licensees' licenses.

ABC uses a two-stage process for adjudicating whether their licensees have violated the terms of their license. At the first stage ("trial"), a hearing before an Administrative Law Judge ("ALJ") is held at which an ABC prosecutor makes the agency's case. At the second stage, ("decision making"), the ABC's director or a designee decides whether to accept, reject, or modify the ALJ's decision.

In each of the consolidated decisions, after trial – but *before* a final decision had been rendered – the ABC prosecutor prepared a report of the hearing and provided the same to the ABC's chief counsel, but not to any of the licensees. While the ALJ in each case had recommended that the accusations be dismissed, ABC subsequently rejected the ALJ's recommendation and suspended the licensee's license. The Appeals Board reversed the ABC's decisions on the basis that the *ex parte* contacts between the ABC prosecutor and the ultimate decision maker deprived the licensees of their right to a fair trial by an impartial tribunal and constituted a due process violation. After the Court of Appeal affirmed the Appeals Board's decision, ABC appealed to the California Supreme Court.

On review, the Supreme Court affirmed the Court of Appeal. The Court noted that, pursuant to amendments passed in 1995, the California Administrative Practices Act ("APA") forbids *ex parte* contacts between an agency's prosecutor and its ultimate decision maker prior to the rendering of a final decision. It then held that the ABC prosecutor violated this prohibition by submitting hearing reports to the ABC decision maker prior to the rendering of a final decision. The Court concluded that the proper remedy for this violation was reversal of the license suspension orders.

Administrative Law/Health Law

Capen v Shewry (2007) 147 Cal.App.4th 680

Plaintiff, a licensed physician, was in the process of building a surgical clinic that he intended to wholly own and operate, and in which other non-owner, non-lessee physicians would be permitted to practice. During this process he was notified by the Department of Health Services ("DHS") that he would have to obtain a license for the clinic because it would be used by non-owner/operator physicians in violation of Health and Safety Code section 1204(b)(1), and did not come within the exemption found in section 1206(a). Section 1204(b)(1) requires that a license be obtained for any clinic that provides out-patient surgical care for patients unless that clinic is "owned or leased and operated as a clinic or office by one or more physicians... in individual or group practice." Alternatively, section 1206(a) excludes from the licensing requirement any clinic that is "owned or leased and operated . . . by one or more [physicians] and used as an office for the practice of their profession."

After receiving the notification from DHS, plaintiff sought declaratory relief on the basis that sections 1204(b)(1) and 1206(a) were ambiguous. Specifically, plaintiff asserted that since these sections could be read to either exempt or not exempt his clinic from the licensing requirement, DHS's adverse interpretation constituted a "regulation" within the meaning of the APA. Since DHS had failed to comply with the APA's rulemaking requirements in formulating its interpretation, plaintiff sought a declaration that it was void. The trial court agreed and declared DHS's interpretation void for lack of compliance with the APA, but did not pass on whether DHS's interpretation of the statutes was correct. DHS appealed.

In a 2-1 decision, the Third District Court of Appeal affirmed in part and reversed in part. Citing the California Supreme Court's recent decision in *Morning Star Co. v. State Bd. of Equalization* (2006) 38 Cal.4th 324, the majority explained that where a statute delegates authority to an administrative agency to apply its expertise to interpret that statute, the agency's failure to follow rulemaking procedures of the APA requires a court to void the agency interpretation and return the matter to the agency. If, however, the ambiguity that precipitates the agency interpretation is susceptible to only one legally tenable construction, a court may resolve that ambiguity and apply it to the case before it. After concluding that resolution of the ambiguity at issue did not require special agency expertise, the majority held that neither sections 1204(b)(1) nor 1206(a) exempted proposed clinic from the licensing requirement. Thus, while the majority affirmed the trial court's decision to void the DHS interpretation, it reversed the trial court's judgment as to the plaintiff.

The dissenting justice agreed with the majority that the statutes were ambiguous, but asserted that resolution of that ambiguity required special agency expertise, and thus the proper disposition was to return the matter to the agency.

Election Law

California Family Bioethics Council v. California Institute for Regenerative Medicine et al., (2007) ___ Cal.App.4th ___ [2007 WL 576027]

Passed in 2004, Proposition 71 added article XXXV to the California Constitution establishing the California Institute for Regenerative Medicine ("CIRM"). It also amended the Health and Safety Code and Government Code to allow for an Independent Citizen's Oversight Committee ("ICOC") to oversee the CIRM and included a Bond Act to fund the CIRM. In upholding the lower court's decision, the First District Court of Appeal addressed four of the challenges posed by the California Family Bioethics Council ("the Council") to the measure.

First, the Council argued that the proposition violated the California Constitution's single-subject rule because it authorized stem cell research and other unspecified research, revised the conflict of interest laws, and also granted CIRM exclusive powers beyond the "scope of stem cell research." The Court rejected this challenge, however, holding that "all [provisions] appear directly germane to the single research mission of the institute created by the proposition."

The Council next argued that the ballot materials related to Proposition 71 "contain[ed] material omissions and misrepresentations that caused its adoption... to violate due process of law." The Court acknowledged "that the bar is very high" for such a claim. In rejecting the challenge the Court observed, "the Council not only does not clear this bar, it barely even get[s] off the ground."

Next, the Court rejected the Council's argument that the Proposition violated the constitutional prohibition against public funding of entities outside of the state's exclusive management and control. (Cal. const. art. XVI, § 3.) The Court noted that unlike entities which have violated this prohibition, the CIRM is "an entity created by the Constitution itself." The statutory framework allowed needed flexibility while maintaining limits and controls "consistent with the requirements" of the Constitution and therefore did not violate this prohibition.

Finally, the Council argued that the specialized conflict of interest rules included in Proposition 71 violated state law. The Court disagreed. It held that to "the extent these provisions conflict with other statutory or common law rules regarding the regulation of conflicts of interest, the more specific and later enacted provisions of the Act govern." The Court also dismissed the Council's argument that such provisions "violate public policy or are somehow inherently unethical."

The court concluded by stressing both its avoidance of a "normative evaluation of the measure" and its "solemn duty to jealously guard the precious initiative power."

Government Law/Conflicts of Interest

People v. Chacon (2007) 40 Cal.4th 558

Maria Chacon was charged with violating Government Code section 1090 after she sought and obtained appointment as city manager while a member of the Bell Gardens City Council. Chacon asserted the defense of "entrapment by estoppel," arguing that she relied upon the City Attorney's advice that such an arrangement was legal. After the trial court informed the parties that it would allow Chacon to assert this defense, the prosecution announced they would be unable to proceed and the trial judge dismissed the charges. In upholding the Court of Appeal's ruling the California Supreme Court held that such a defense was not available to Chacon.

This defense "rest[s] on the premise that the government may not actively provide assurances that conduct is lawful, then prosecute those who act in reasonable reliance on those assurances." In *Raley v. Ohio* (1959) 360 U.S. 423, the U.S. Supreme Court found the defendants' contempt conviction for attempting to invoke their privilege against self-incrimination in front of Ohio's Un-American Activities Commission violated due process since the commission chairman misinformed the defendants that they had the right to claim such a privilege under state law. In *Cox v. Louisiana* (1965) 379 U.S. 559 the U.S. Supreme Court reversed a conviction because the defendant located a picket at the erroneous direction of a local police chief, whose officers later arrested the defendant.

In *Chacon*, the Court found these cases distinguishable. The Court noted that Chacon was not an "ordinary citizen confronting the power of the state" as the defendants in *Raley* and *Cox* were. Rather she held a position which required her to "discharge her responsibilities with integrity and fidelity." The Court viewed extending this defense to section 1090 as "antithetical to the strong public policy of strict enforcement of conflict of interest statutes." Continuing, the Court observed that this defense was especially inappropriate whereas here the official whose advice was being relied upon was subordinate to the person claiming the defense.

Perhaps most importantly, the Court explained that the City Attorney is not "similarly situated to those public officials [including those in *Raley* and *Cox*] whose actions have been found to bind the state." Unlike the police chief charged with enforcing the statute at issue in *Cox* or the commission chairman in *Raley* who "clearly appeared to be the Agent of the State," a city attorney's relationship to a member of the city council is "simply [] a lawyer advising a client." While expressing no view on the violation of section 1090, the Court concluded by noting that it was unwilling to allow Chacon to escape the rule that a "citizen cannot rely on a private lawyer's erroneous advice as a defense to a general intent crime" just because that attorney "happened to hold a governmental position."

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A Message from the Chair

By Betty Ann Downing, Esq.

In our every day professional responsibilities, we often put substantial effort into an endeavor such as a memo, brief, presentation or other project. When it's done, we think about ways it can be improved or maybe a new angle to the issues that would be interesting to pursue. In other cases, we wish an opportunity existed to reach a wider audience. Or maybe engaging others in a robust discussion on a cutting-edge topic is of interest.

The Public Law Section has opportunities to fit your professional desires and share your talents.

Consider adapting a memo or brief into an article for the *Public Law Journal*. Volunteer to give your presentation at the State Bar Annual Meeting held in the fall or at the Section Education Institute held in January. As an added bonus, you will earn MCLE units for these activities.

How Government Works: An Introduction to Local and Regional Public Agencies in California, published by the Public Law Section, has been distributed to every public library in California as a public service project of the Public Law Section. Members of the Public Law Section should have received a copy in the mail. In addition, it is available to everyone on the Public Law Section portion of the State Bar website and we encourage you to utilize this terrific brochure.

I welcome your inquiries regarding opportunities to be involved in activities of the Public Law Section ~ please contact me at badowning@kaufmandowning.com.

The High Stakes Battle between Indian Tribes' Sovereign Immunity and California's Enforcement of the Political Reform Act

By Anna F. Molander*

Pitted in battle are two fundamental legal interests: an Indian tribe's sovereign immunity from suit by the state and California's right to protect its electoral process. Campaign finance law triumphed in the first three rounds. Can tribal sovereign immunity trump state election law before the United States Supreme Court?

On December 21, 2006, the California Supreme Court issued its landmark decision on the intersection of campaign finance law and tribal sovereign immunity, *Agua Caliente Band of Cahuilla Indians v. Superior Court* (2006) 40 Cal.4th 239 (*Agua Caliente*). California's Fair Political Practices Commission (FPPC) sued the Agua Caliente Band of Cahuilla Indians (Tribe) to enforce the reporting requirements of California's Political Reform Act. A deeply divided court held that tribal sovereign immunity could be diminished to allow the FPPC's enforcement action which is necessary to exercise state rights protected under the Tenth Amendment and the Guarantee Clause. The Court also concluded that the FPPC had inadequate alternatives for enforcing the Political Reform Act. Therefore, the FPPC was entitled to sue a tribe in state court to enforce the Act.

Tribal Sovereign Immunity Beginnings

Tribal sovereignty was first recognized by the United States Supreme Court in its 1831 decision, *Cherokee Nation v. Georgia* (1831) 30 U.S. 1. Unlike foreign nations, tribes have historically been treated as "domestic dependent nations" subject to the dominion of the United States. Sovereign immunity, on the other hand, is an attribute of tribal sovereignty which precludes suits against Indian tribes, except where affirmatively permitted by an act of Congress or where the tribe has waived immunity from suit. (*Turner v. United States* (1919) 248 U.S. 354; *United States v. United States Fidelity & Guaranty Co.* (1940) 309 U.S. 506; *C & L Enterprises, Inc. v. Citizen Band Potawatomi Indian Tribe of Oklahoma* (2001) 532 U.S. 411.)

The contours of tribal sovereign immunity from suit were explored in Supreme Court jurisprudence throughout the Twentieth Century with little deviation from this hard and fast rule. The Court wrestled with issues such as a tribe's right to deny tribal membership and a state's right to collect taxes from tribes. (*Santa Rosa Pueblo v. Martinez* (1978) 436 U.S. 49 (*Martinez*); *Oklahoma Tax Com. v. Citizen Band Potawatomi Indian Tribe* (1991) 498 U.S. 505 (*Oklahoma Tax Com.*) In *Martinez*, a female tribe member sued a federally recognized Indian tribe for denying her children tribal membership because she married outside the tribe while, at the same time, admitting children of similarly situated male members. (*Martinez, supra,* 436 U.S. 49.) The Court would not intervene and affirmed the tribe's right to self-determination. (*Id.*)

In 1991, the Court further solidified tribal sovereign immunity when it protected a tribe from the State of Oklahoma's attempts to collect taxes on the sale of cigarettes on Indian land absent a clear waiver of immunity or congressional abrogation. In *Oklahoma Tax Com., supra,* 498 U.S. 505, the Court held that a state cannot tax sales of goods to members occurring on Indian land but may collect taxes on sales to nonmembers of the tribe. The Court stated that Oklahoma was barred by sovereign immunity from pursuing the most efficient remedy for imposing a cigarette tax but Oklahoma could use other alternatives for assessing the tax. (*Id.* at 512-14.)

Most recently, in *Kiowa Tribe of Oklahoma v. Manufacturing Technologies, Inc.* (1998) 523 U.S. 751 (*Kiowa Tribe*), the Supreme Court announced that sovereign immunity from suit extended to off-reservation commercial activities. The Court concluded that it has not drawn a distinction between commercial and government activities. (*Kiowa Tribe, supra,* 523 U.S. at 754-755.) The constitutionally guaranteed sovereign immunity afforded states is not coextensive with that of tribes because tribes were not present at the Constitutional Convention. (*Id.* at 756.) The Court held that Congress must legislate to restrict tribal immunity from suit. (*Id.* at 758-759.) At the time of the *Kiowa Tribe* decision, the Court recognized the ongoing debate in Congress and invited Congressional reform of tribal sovereign immunity; Congress declined to make sweeping changes. (Seielstad, *The Recognition and Evolution of Tribal Sovereign Immunity under Federal Law: Legal, Historical, and Normative Reflections on a Fundamental Aspect of American Indian Sovereignty* (2002) 37 Tulsa L.Rev. 661, 665-666.)

History of California's Political Reform Act

Against this backdrop, the California Supreme Court evaluated enforcement of the Political Reform Act against a federally recognized Indian tribe. The Political Reform Act was overwhelmingly adopted on June 4, 1974, by ballot initiative (Proposition 9). (Gov. Code § 81002, *et seq.*) The Political Reform Act requires disclosure of political

contributions and expenditures. (Gov. Code § 81002(a).) Lobbyists are also regulated by the Act, requiring lobbyists and lobbyists' employers to report lobbying activities. (Gov. Code §§ 81002, 86113, and 86116.) The Political Reform Act "requires the FPPC to enforce the statute equally against all affected contributors." (*Agua Caliente, supra,* 40 Cal.4th at 244-245.) The specific purpose of this law is to provide a vehicle to inform voters and inhibit improper practices. (Gov. Code § 81002.)

Like federal legislation (the Bipartisan Campaign Finance Reform Act, more popularly known as the McCain-Feingold Act), the Political Reform Act requires both donors and recipients to file reports. Funds contributed to ballot measure committees cannot be limited because to do so would unconstitutionally interfere with First Amendment freedoms of speech and association. (*Citizens Against Rent Control v. Berkeley* (1981) 454 U.S. 290; see also *Citizens to Save California v. FPPC* (2006) 145 Cal.App. 4th 736 (invalidating a regulation adopted by the FPPC limiting contributions to candidate-controlled ballot measure committees).)

However, until the *Agua Caliente* decision, the FPPC claims a "loophole" existed whenever a tribe used funds in connection with ballot initiatives. Applying the doctrine of tribal sovereign immunity, the FPPC could not sue to enforce reporting requirements on a federally recognized tribe and no other independent source of reporting information necessarily existed. Simply, if the tribe spent its funds to support or oppose a ballot measure without providing any funds to a non-tribal committee, no one reported the contribution and no one reported the expenditure.

California's Supreme Court grappled with these issues and a majority of four justices carved out a narrow exception to the doctrine of sovereign immunity under these facts, where the FPPC is suing to enforce California's Political Reform Act.

California Supreme Court Majority Opinion

Associate Justice Ming W. Chin wrote for the majority, including Chief Justice Ronald M. George, and Associate Justices Marvin R. Baxter and Carol A. Corrigan. The Court created a narrow exception to the doctrine of sovereign immunity through application of the Tenth Amendment and the Guarantee Clause.

Factual Background

The majority opinion outlined the procedural and factual background of the dispute between the Agua Caliente Band of Cahuilla Indians and the FPPC. The FPPC sued the Tribe based on political campaign contributions in 1998 totaling more than $7,500,000; in 2001 of $175,250; and in the first half of 2002 of $426,000. The FPPC alleged that the Tribe violated the Political Reform Act by failing to report lobbying interests and late contributions of more than $1 million, and failing to file required semi-annual campaign statements. One unreported contribution allegedly made by the Tribe was to support Proposition 51, an unsuccessful statewide ballot initiative that would have authorized $15 million per fiscal year for eight years to fund projects including a passenger rail line from Los Angeles to Palm Springs. The Tribe operates a casino in Palm Springs. Proposition 51 was not adopted by the electorate. The complaint sought monetary penalties against the Tribe and an injunction requiring the Tribe to file campaign disclosure statements.

Procedural History

The Tribe, specially appearing, moved to quash services of the summons for lack of personal jurisdiction based on tribal sovereign immunity from suit. The trial court issued a written opinion in which Sacramento County Superior Court Judge Loren McMaster denied the Tribe's motion to quash. The trial court rejected the Tribe's assertion that sovereign immunity applies where a tribe is alleged to have violated laws designed to protect the integrity of a state's own political processes. The Tribe was subject to suit, the trial court held, because otherwise sovereign immunity would intrude upon the state's exercise of its reserved power under the Tenth Amendment and would interfere with the republican form of government guaranteed to the states under Article IV, Section 4, of the United States Constitution (Guarantee Clause).

The Tribe petitioned the Court of Appeal for the Third Appellate District for a peremptory writ of mandate directing the trial court to vacate its decision, quash the services of the summons for lack of personal jurisdiction, and grant the Tribe's motion. The appellate court denied the Tribe's petition. The California Supreme Court granted the Tribe's first petition for review and transferred the matter to the Court of Appeal for the Third Appellate District directing it to vacate its order denying the Tribe's petition and to order the FPPC to show cause why the Tribe's relief should not be granted. The appellate court issued the order to show cause and the FPPC filed its response. However, it again denied the Tribe's motion for a writ of mandate, citing the Tenth Amendment and the Guarantee Clause. The California Supreme Court granted review.

Contentions of the Parties

Before the Supreme Court, the Tribe recognized that California has the power to regulate its political processes; however, the FPPC is not entitled to sue a federally recognized Indian tribe to enforce the laws and regulations. The FPPC asserted that tribal sovereign immunity is a federal common law that does not permit tribes to interfere with state sovereign power over state elections. The FPPC claimed that tribal sovereign immunity should not be extended to matters involving a state's constitutional authority to regulate its elections or legislative processes.

Sovereign Immunity as Federal Common Law

The Court first turned to a discussion of the United States Supreme Court's jurisprudence on tribal sovereign immunity. "The general rule still holds that although Indian tribes are not immune from lawsuits filed against them by the United States, the Indian tribes' sovereign status affords them immunity from state jurisdiction." (*Agua Caliente, supra,* 40 Cal.4th at 248.) The Court rejected the Tribe's argument that sovereign immunity from suit is based in the Constitution; rather, the Court observed that the Constitution is silent regarding "state action into sovereign immunity questions." (*Id.*)

The Court reviewed possible sources of constitutionally-based tribal sovereign

immunity. The Tribe argued that the "high court has interpreted the Indian Commerce Clause to mean that Indian relations are the 'exclusive province of federal law.'" (*Agua Caliente, supra,* 40 Cal. 4th at 249.) According to the Tribe, the "central function of the Indian Commerce Clause is to provide Congress with plenary power to legislate in the field of Indian affairs." (*Id.*) However, affirming the appellate court's analysis, the California Supreme Court opined that the Indian Commerce Clause cannot support tribal immunity here because it is a grant of power to Congress, where Congress has not specifically authorized immunity, and solely concerns commercial activities not political process. (*Id.*) The Court also dismissed any argument that the treaty clause of the Constitution is a source of Congressional plenary power over the Tribe because the Tribe cited no treaty between it and the federal government. (*Id.* at 250; see also *U.S. v. Lara* (2004) 541 U.S. 193, 201-202 (discussing how in 1871 Congress enacted 25 U.S.C. § 71 which disposed of the practice of treaties between the federal government and tribes).) Furthermore, the Court observed that the Supremacy Clause does not support the superiority of tribal sovereign immunity as it is a common law rule. (*Id.* at 250.)

The California Supreme Court stated that "like foreign sovereign immunity, tribal sovereign immunity has historically been applied as a matter of federal law, not constitutional law." (*Agua Caliente, supra,* 40 Cal.4th at 251.) The California Supreme Court discussed at length the United States Supreme Court's commentary in *Kiowa Tribe*, indicating its disenchantment with the doctrine of tribal sovereign immunity. "Drawing the parallel between foreign and tribal sovereign immunity, in *Kiowa Tribe* the court noted that like foreign sovereign immunity, tribal immunity is a matter of federal law and thus only Congress can alter immunity through 'explicit legislation.'" (*Id.* at 253.) However, the court noted "[t]here is a difference between the right to demand compliance with state laws and the means available to enforce them." (*Id.*)

The Court drew two distinctions regarding state election law and limitations on the application of tribal sovereign immunity. First, the Court observed that "[i]ndeed, unlike tribal members, foreign governments are prohibited from participating in our elections." (*Agua Caliente, supra,* 40 Cal.4th at 253.) Therefore, any parallel to foreign governments is inapt to the election law context because tribal members participate in elections and make campaign contributions. (*Id.* at 259.) Next, pointing to a personal injury lawsuit that denied a tribal court subject matter jurisdiction over non-Indians, the Court stated that the high court has recognized limitations on tribal exercise of regulatory and judicial jurisdiction. (*Id.* at 254; see also *Strate v. A-1 Contractors* (1997) 520 U.S. 438.) Thus, the Court reasoned that the United States Supreme Court did not view tribal sovereign immunity as an absolute and would permit a common law limitation where it came to the application of state election laws to tribes.

The Tenth Amendment and Guarantee Clause

The Court reviewed the limited United States Supreme Court jurisprudence on the Tenth Amendment and the Guarantee Clause of Article IV, Section 4 of the United States Constitution. Under the Tenth Amendment and Guarantee Clause, a republican form of government is reserved and guaranteed to the states. (*Agua Caliente, supra,* 40 Cal.4th at 256.) The United States Supreme Court has "observed that Tenth Amendment and the [G]uarantee [C]lause provide an important check on Congress' power to interfere with the state's 'substantial sovereign powers under our constitutional scheme.'" (*Id.* at 257, citing *Gregory v. Ashcroft* (1991) 501 U.S. 452, 461.) The Court concluded that the United States Supreme Court has never held that federal common law "trumps state authority when a state acts in political matters resting firmly within its constitutional prerogatives." (*Id.* at 259, citations omitted.) Therefore, given the "unique facts," the Court held that the Guarantee Clause, along with the rights reserved to the states under the Tenth Amendment, provided the FPPC with authority under the federal Constitution to sue the Tribe to enforce the Political Reform Act. (*Id.*)

Enforcement Alternatives

Buttressing its holding, the Court concluded that no viable alternatives existed for enforcing the Political Reform Act. The Court reasoned that "[t]he inability to enforce the [Political Reform Act] against the Tribe, a major political donor to political campaigns, has the effect of substantially weakening the [Act]." (*Agua Caliente, supra,* 40 Cal.4th at 260.) Furthermore, [p]reserving the integrity of our democratic system is too important to compromise with weak alternative measures that the state may not be able to enforce." (*Id.* at 261.) Therefore, the Tribe's proposals – agreements between the state and the tribes, petitioning Congress for intervention, or using alternative sources for obtaining information – were insufficient to persuade the Court. Rather, the Court found that the alternatives were "uncertain" and unconvincing. (*Id.* at 260.)

The majority concluded that "[i]n light of evolving United States Supreme Court precedent and the constitutionally significant importance of a state's ability to provide a transparent election process, with rules that apply equally to all parties who enter the electoral fray ... [w]e therefore find that the Tribe lacks immunity from suit for its alleged failure to follow the [Political Reform Act's] mandated reporting requirements." (*Agua Caliente, supra,* 40 Cal.4th at 261.)

The Dissent

Associate Justice Carlos R. Moreno, joined by Associate Justices Joyce L. Kennard and Kathryn M. Werdegar, strongly dissented from the majority opinion on the ground that restrictions on tribal sovereign immunity reside entirely with Congress. (*Agua Caliente, supra,* 40 Cal.4th at 263 (dis. opn. of Moreno, J; Kennard, J, & Werdegar, J.)) Tribal immunity is distinguishable from that of the states because "tribes were not at the Constitutional Convention. They were thus not parties to the 'mutuality of ... concession' that 'makes the States' surrender of immunity from suit by sister States plausible.'" (*Id.* at 263, citing *Kiowa Tribe, supra,* 523 U.S. at 756.)

The dissenting justices observed that "[t]he United States Supreme Court has thus far rejected all attempts to limit Indian lawsuit immunity that have not originated with Congress." (*Agua Caliente, supra,* 40 Cal.4th at 263.) "[T]he Supreme Court has not wavered from the principle that whatever problems arise from the conflict between Indian and

state sovereignty are matters for Congress, exercising its plenary power over Indian affairs, to solve." (*Id.* at 624.)

Neither the Tenth Amendment nor the Guarantee Clause has been interpreted to provide much of a limitation on federal power. (*Agua Caliente, supra,* 40 Cal.4th at 265.) Indeed, whether issues arising under the Guarantee Clause are justiciable remains unsettled. (*Id.*) The minority found the majority's reliance on the United States Supreme Court's decision in *Gregory v. Ashcroft, supra,* 501 U.S. 452 too far reaching, as that decision stands for the more modest application of the "plain statement rule" with regard to the statutory language of the Age Discrimination in Employment Act of 1967 (29 U.S.C. § 621). (*Id.* at 266.) That is, in order for Congress to alter the balance between the states and the federal government, Congress must do so unmistakably in the language of the statute. (*Id.*)

The dissent reiterated that, "fundamentally, the Tenth Amendment, which speaks in terms of power 'reserved to the states,' gives the states no power to abrogate Indian sovereign immunity, because all such power was ceded to the federal government when the states ratified the Constitution." (*Agua Caliente, supra,* 40 Cal.4th at 266.) The power to regulate Indian affairs was conferred on the federal government and, therefore, cannot be ceded to the states. (*Id.*) The dissent further attacks the majority's approach to the *Gregory* holding because as interpreted by the majority "even if Congress legislatively affirmed Indian sovereign immunity from suits involving political reporting of contributions to the states, such legislation would be constitutionally invalid." (*Id.* at 267.)

The dissent argued that the Guarantee Clause only secures some "basic minimums of state sovereignty," which political reporting is not. (*Agua Caliente, supra,* 40 Cal.4th at 267.) In fact, even if the Tenth Amendment and Guarantee Clause focused on preserving political self-determination, such as a state's ability to decide the qualifications of its government officials, tribes have no ability to interfere in those fundamental areas. (*Id.* at 268.) In fact, the Tribe conceded that it is subject to the Political Reform Act's reporting requirements. (*Id.*) Denying the FPPC the right to sue a tribe to enforce its election reporting requirements does not put that state's interest out of reach. Rather, California can pursue other options, such as an agreement with the Tribe, or the states can petition Congress to address the growing issue of tribal campaign contributions. (*Id.*)

The dissent concluded that if we are entering a new era of tribal economic and political power, "federal law teaches that it is Congress, not the states, that is constitutionally delegated and historically assigned the task of making that modification, and it is in a unique position 'to weigh and accommodate the competing policy concerns and reliance interests.'" (*Agua Caliente, supra,* 40 Cal.4th at 269, citing *Kiowa Tribe, supra,* 523 U.S. at 759.)

The Final Round: Will the U.S. Supreme Court Grant Cert?

Although the United States Supreme Court and Congress have historically sided with tribes in support of sovereignty, grant of a petition for certiorari is not a certainty. (Whitney, David, "Tribes' Sovereign Status Under Fire," *The Sacramento Bee*, p. A1, A12, February 18, 2007.) The Tribal Supreme Court Project has registered concerns with appealing the California Supreme Court's decision in light of the oft-quoted comment from Justice Anthony Kennedy in *Kiowa Tribe* that "[t]here are reasons to doubt the wisdom of perpetuating the doctrine [of sovereign immunity]." ("Tribes' Sovereign Status Under Fire" at A-12.) Meanwhile, on February 28, 2007, the California Supreme Court denied the Tribe's petition for rehearing, staying entry of the remittitur to permit filing of a petition for certiorari with the United States Supreme Court. Whether or not the Tribe will petition for certiorari remains an open question.

If the Tribe does appeal to the United States Supreme Court, the risks and rewards are great. This case brings clearly into focus the competing interests. The Tribe's $7.5 million unreported contribution in 1998 pushed California's campaign reporting rules to the outer limits. Will Congress act to limit tribal campaign contributions or require tribes to comply with state reporting requirements? However, permitting a state agency to sue an Indian tribe undisputedly infringes the historic institution of tribal sovereign immunity. With a newly constituted United States Supreme Court, it is impossible to determine where in the spectrum the high court would land.

* Anna F. Molander is an attorney with Banks & Watson in Sacramento. Her practice focuses on business, professional liability and administrative law matters.

The Right to Remain Aware: A Law Enforcement Public Information Performance Audit

*By Terry Francke**

Last December 4, in the span of a single workday, employees and volunteers from 31 newspaper and broadcast news organizations visited 184 police and sheriff's departments and 32 California Highway Patrol area offices in 30 of California's 58 counties, from San Diego to Siskiyou. The visits enabled a systematic study — an audit — of the openness of law enforcement agencies to sharing information about themselves with citizens in their local communities, including but not limited to their compliance with state public information law. The project was designed and coordinated by Californians Aware.

The purpose of the audit was to document and compare the relative openness of law enforcement agencies to the public scrutiny that is the right of every Californian under both statutory and constitutional law,[1] especially when those asking about crimes, arrests and other facts are not representatives of the news media. The fundamental issue was: Do those charged with enforcing the law know and heed the laws requiring open government that are applicable to their own activities? A related question was: Legal obligations aside, how accommodating and responsive are law enforcement professionals to the inherently amateur and uninformed inquiries that may come their way?

Why a Surprise Audit?

Californians Aware (CalAware) continually receives inquiries about particular agencies' compliance with the open meetings and public records laws. These anecdotal contacts leave a general sense that actual practices around the state may be straying from legal requirements. But a systematic in-person audit of a significant sample of particular types of agencies provides the only means we have discovered for concluding what may be the rule or the exception in actual practice. What is the average level of performance? If unsatisfactory in terms of either legal compliance or public service expectations, could it improve through training? Is clarifying legislation in order? An audit can and should also provide the agencies themselves with a sense of how their performance compares with the average among their peers.

The surprise visitation process used by CalAware in its audit, while unprecedented in California — and probably nationwide — in its scale, is not new. Public information compliance audits conducted by media organizations and others have been becoming more widespread in recent years in various states.[2] Last year CalAware conducted a comparable audit of the practices of 31 state agencies.[3] There are private sector analogues as well. For the past several decades, corporations in the retail and hospitality industries, and even some health clinics, have increasingly used "secret shoppers" — trained observers sent by market research firms in the guise of patrons or patients — to report back to the company on such realities as the knowledge, professionalism and customer skills of its public contact staff.[4] Audits of government agencies' public information practices are simply one variation of this approach.

Why Make Law Enforcement Agencies the Auditing Priority?

While CalAware plans future audits focusing on such institutions as public education, jails and prisons, courts and special districts as well as county and city governments, local law enforcement was its first statewide test sector for a variety of reasons.

1. Law and order are top civic priorities.

As can be seen in Iraq and other troubled areas much closer to home — even in our own communities — if citizens do not feel safe where they live, work, play or study, other public services and social linkages are fundamentally undermined.

2. Law enforcement gets a large share of local tax revenues.

As noted by the State's Legislative Analyst in her 2004 report, "One recent study examining state and local expenditures nationwide shows that California has the third highest ranking in the nation with regard to per capita expenditures for police protection. This suggests that California's local governments place a high priority on law enforcement."[5] The latest data from the State Controller's Office (fiscal year 2003-04) show that police services represented 17 percent of total city expenditures — a share greater than any other function except total public utilities, which was 20 percent.[6] At the county level for the same period, sheriff's police and jail operations again accounted for 17 percent of total expenditures, exceeded only by welfare payments at 22 percent.[7]

3. Law enforcement resource demands are increasing.

How many times do we hear of proposed local tax increases to put more officers on the street or increase salaries to keep departments' recruiting competitive?

4. Police agencies are entrusted with extraordinary power.

To meet the priorities and expectations of the community, police agencies are given a unique authority for surveillance, investigation, search, seizure, detention and arrest. They are the one unit of government that is in effect licensed to invade civil liberties — within bounds.

5. Police agencies operate in extraordinary secrecy.

Their investigative activities pursuing anything from a broken taillight to a murder are documented in records they never need share with the public,[8] — and almost never do, even when the risk of harm from such disclosure is long past.[9] They have even recently been authorized to work with district attorneys to keep certain information in crime reports filed in court beyond the reach of the public.[10]

6. Individual peace officers are armed with extraordinary power.

Executing the State's authority to intrude and coerce, they are the only government agents whose responsibilities confer — again within bounds — license to do what for others could be criminally prosecuted as stalking, breaking and entering, assault, battery, or even homicide.

7. Peace officer misconduct is given extraordinary secrecy.

Unlike the rule for other public employees, whose confirmed and disciplined misconduct is a matter of public record,[11] any and all information in a peace officer's personnel file

— including but not limited to records of confirmed and disciplined misconduct — is confidential and accessible only by a special motion in a civil or criminal proceeding. The confidentiality even persists to include the records of a normally open civil service hearing in which the officer challenges the discipline.[12]

8. The news media have no exclusive right to police information.

Despite the general secrecy noted so far, certain basic facts about crimes, incidents and arrests remain on the record;[13] otherwise the media would have no source of news about them. But the law makes these facts also available to the general public. This point seems lost on those law enforcement agencies that have so little experience with direct inquiries from citizens that they resist them as illegitimate or even suspect.

9. The news media cannot provide the public with all significant police information.

Few if any newspapers or broadcasters have the resources to convey the day's or week's full complement of facts about local crimes, incidents and arrests. Editors understandably assume that most in the community want to know mainly about murders and violent crimes, although even they may go under-reported in larger urban areas. But most details about most police events are never brought to public attention because the media cannot do so.

10. People often need — and are increasingly motivated — to find out for themselves.

Incidents observed on the street, patrol car lights flashing next door at midnight, rumors about a co-worker's arrest, children's tales about a disturbance at school — such events may be reflected in a news story with satisfactory details, but then again they may not. Concerned or even just curious persons, increasingly encouraged by the Internet to check out matters of interest for themselves, may seek information that has escaped the news eye of the media. Some law enforcement agencies are providing impressive amounts of crime information on the Internet,[14] which is all to the good but may actually increase curiosity about specifics. Both the law and the realities suggest that people who show up to seek the facts for themselves should be provided with all information that is available to reporters — whether or not any reporter has happened to ask for it. And, consistent with the law, inquiries should be permitted to be anonymous — no questions asked. If information is so sensitive that its release could lead to some kind of specifiable harm, than under the law it need not be made public to anyone in any event.

What Records or Information Were Requested?

The auditors made an oral request to see three items and left behind a written request for access to 10 other items. The oral request was to see:

- the Form 700 statement of financial interests[15] filed by the department's senior commander;
- all publicly releasable information concerning any burglaries, armed robberies or sexual assaults occurring from 30 to 15 days earlier; and
- all publicly releasable information concerning any arrests for the specified crimes in the specified period.

The written request left behind asked to inspect:

- the most recent record of asset forfeiture fund disbursements;[16]
- the most recent summary of officer discipline statistics;[17]
- the officer salary schedule;
- actual 2006 compensation records, workers compensation claims and second job documentation for each officer, with names and other identifiers removed;[18]
- the most recent death in custody report[19] sent to the Department of Justice; and
- the employment contract of the department's highest ranking officer;[20]

and for a copy of:

- any media relations/public information policies; and
- any document stating the fee(s) to be charged for copies of records or reports.

The detailed audit methodology, scoring rationale and result breakdowns by region and individual departments, as well as findings on the results of all request items, can be found on CalAware's website.[21]

What Were CalAware's Overall Conclusions?

1. Many if not most California policing agencies failed the open government obligations that they share with other public agencies so radically that it is hard to view them as part of the same public universe.

2. Those obligations are to know the rudiments of the California Public Records Act and to treat unfamiliar citizens who request information with at least the same readiness to provide it as is granted to journalists, without demanding identity and other disclosures that are neither sanctioned by the law nor explained by innocent need. In this audit the most common experience was that the requester was required to provide his or her identification, purpose and/or affiliation, but then left the department or office empty-handed. At best, they waited one or more weeks to learn whether any information would be forthcoming at all.

3. Most information was not forthcoming. Ironically, the only requests made in the audit of sheriff's and police departments that led more than half of them (52 percent) to provide access were for copies of the department's public information policy and of its fee policy for copies of crime reports for victims. More than a month after the audit visits (January 9), CHP offices had yet to provide any information.

4. Another common pattern was that the departmental clerk or spokesperson, instead of taking the responsibility for assembling records requested by the auditor — all of which dealt with the department's own operations or personnel — sent the auditor to other departments of the city, county or CHP bureaucracy in search of the information. While the law does not expressly prohibit such redirection of requesters, it does allow agencies to take more time in order to retrieve remotely stored or filed records,[22] and at least in some such cases it was apparent that the audited department already had copies of the information but chose to send requesters elsewhere.

5. It is not clear that legislation is essential to correct these striking failings. Statutes cannot compel common courtesy or a sense of professionalism and responsibility, whose presence in most of these departments

would have made so much difference.

6. But training is clearly in order. Whatever departmental or CHP leaders may know, those who deal directly with the public far too often not only do not know the California Public Records Act and related laws, but what is worse, they do not appreciate how misinformed they are. Such a confident fund of inaccurate or downright mythical information, combined with a mindset that too often considers the questioning stranger a potential threat to be probed rather than a citizen to be helped, is seldom the fault of those it afflicts. Most public contact employees appeared literally not to know any better. But that would be of little comfort to the baffled if not intimidated person who is turned away knowing only that his or her name has been put on file as someone asking questions.

What Are CalAware's Follow-Up Plans?

Some agencies have already instituted their own changes of procedure as a result of the audit, acknowledging it as a "wake-up call."[23] One police department almost immediately asked CalAware representatives to present a training session on the law and helpful practices, and two others had issued the same invitation by mid-March. These presentations include a suggested policy statement grounded in undisputed provisions of law.[24] CalAware will also, before the end of the year, re-audit some of the same agencies to measure what if any overall change has occurred, and what areas need continued or repeated attention. Beyond that, as noted, it will conduct statewide audits of other public agencies, and offer interested citizens and organizations instructions on how to conduct their own audits.

What is Californians Aware?

Californians Aware (CalAware) is a nonprofit organization established in 2004 to help journalists and others keep Californians aware of what they need to know to hold government and other powerful institutions accountable for their actions. Its mission is "to support and defend open government, an enquiring press and a citizenry free to exchange facts and opinions on public issues."[25] CalAware's 12-member governing board comprises three director positions each from the ranks of government officials and employees, newspaper and broadcast journalists, and citizens otherwise interested in public issues, plus three seats for attorneys representing clients in each of the government/journalism/citizen categories.[26]

CalAware works to:

- improve open government and free expression law by supporting appropriate legislation and appellate litigation and the development of local sunshine ordinances;
- improve understanding of such "public forum law" through workshops, website content and publications;
- improve practices in observance of the law through audits and follow-up training; and
- provide information and assistance in response to particular queries to its telephone and e-mail service and its online message board forums.

CalAware operates as a public benefit organization, eligible to receive tax-deductible charitable contributions under Internal Revenue Code §501(c)(3), but receives no governmental grants and subsists on private donations, memberships, activity fees and publication sales. By far, most of this revenue stream comes from non-media sources.

Endnotes

1. Gov. Code § 6250 et seq., (the California Public Records Act), and Cal. Const. Art 1, §3, subd. (b), added by Proposition 59 of 2004.

2. See http://foi.missouri.edu/openrecseries.html

3. See details at https://www.calaware.org/programs/audits.php

4. See, e.g., "Secret Shoppers Help Businesses," http://chronicle.augusta.com/stories/020700/abc_secret.shtml

5. See http://www.lao.ca.gov/analysis_2004/crim_justice/cj_04_cc_tanf_anl04.htm

6. See http://www.sco.ca.gov/ard/local/locrep/cities/reports/0304cities.pdf

7. See http://www.sco.ca.gov/ard/local/locrep/counties/reports/0304counties.pdf

8. *Haynie v. Superior Court (County of Los Angeles)*, 26 Cal.4th 1061 (2001)

9. *Williams v. Superior Court (Freedom Newspapers, Inc.)*, 5 Cal.4th 337 (1993)

10. Pen. Code § 964

11. *American Federation of State etc. Employees v. Regents of University of California*, 80 Cal.App.3d 913 (1978)

12. *Copley Press, Inc. v. Superior Court of San Diego County*, 39 Cal.4th 1272 (2006)

13. Gov. Code § 6254, subd. (f), par. (1), (2)

14. See, e.g., http://gis.cityofsacramento.org/website/sacpd, http://www.papd.org/records/press_log.html

15. See http://www.fppc.ca.gov/index.html?id=234#sei

16. See Health & Safety Code § 11495, subd. (a)

17. See Pen. Code § 832.7, subd. (c)

18. Given the unsettled state of case law on access to such information—even with identifiers deleted—CalAware did not score the reactions to these requests.

19. See Gov. Code § 12525

20. See Gov. Code § 6254.8

21. See https://www.calaware.org/audits/index.php

22. See Gov. Code § 6253, subd. (c), par. (1)

23. See, e.g., "Police department revises open records procedure," Contra Costa Times 3/21/07, originally posted at http://www.contracostatimes.com/mld/cctimes/news/local/states/california/counties/west_county/16945094.htm

24. See http://calaware.org/uploads/Model_Police_CPRA_Policy_(Annotated).pdf

25. Information on CalAware's mission is at https://www.calaware.org/calaware/about.php

26. Information on CalAware's board is at https://www.calaware.org/calaware/bios.php

* Terry Francke is General Counsel of Californians Aware, a nonprofit organization established in 2004 to help journalists and others keep Californians aware of what they need to know to hold government and other powerful institutions accountable for their actions. Its mission is "to support and defend open government, an enquiring press and a citizenry free to exchange facts and opinions on public issues."

Round and Round We Go . . .?

*By Kara Ueda**

A new "revolving door" law prohibiting former local officials from representing clients before the agencies they left took effect on July 1, 2006. Government Code section 87406.3 prohibits certain top-level local officials from making certain types of communications and appearances before their former agencies for one year after leaving their agency. The law applies to local elected officials, county chief administrative officers, city managers, and general managers and chief administrators of special districts.

Types of Communications Affected

Both oral and written communications to, as well as formal and informal appearances before, the local government agency, any committee, subcommittee, or current member of the local government agency are prohibited under certain conditions. They are prohibited if the former official is acting as an agent or attorney, or on behalf of another person for compensation, and such appearance or communication is for the purpose of either influencing administrative or legislative action or influencing a proceeding involving the issuance, amendment, awarding, or revocation of a permit, license, grant, contract, or the sale or purchase of goods or property.

For example, this law would apply to a city council member who leaves office and resumes a full-time practice as a land use attorney. The former council member would be precluded from appearing before or communicating with the city on behalf of a developer client for one year after leaving office if the purpose was to try to win approval of a land use entitlement for that client's project within the city.

Exceptions

(1) Appearance on Behalf of Another Public Agency

The restriction does not apply to a local public official who goes to work for another public agency and then appears before the former agency on behalf of the new employer.

For example, a member of the county board of supervisors who decides not to seek reelection and takes a job as the director of community development with a city within the county may speak on behalf of the city at the board of supervisors meeting even though he left the county less than a year before.

(2) Officials Who Left Office Before July 1, 2006

The FPPC has provided written advice that a local public official who left office prior to the law's effective date of July 1, 2006 is not subject to the one-year ban. *See Griffith Advice Letter, No. I-06-040.*

Local Policies

Some local agencies may already have their own revolving door policies. The statute specifically provides that it does not preclude a local public agency from adopting its own ordinance or policy that is more restrictive than state law.

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